Supreme Court of the United States

OCTOBER TERM, 1939

No. 240

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN and ROBERT GOTTFRIED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF PETITIONER NARDONE.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER NARDONE.

Opinion Below.

The opinion of the Circuit Court of Appeals, reported in 106 Fed. (2nd) 41, appears in the record at page 358 *et seq.*

No opinion was rendered by the United States District Court for the Southern District of New York, in which the cause was tried.

Jurisdiction.

The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, Title 28 U. S. C. A. Section 347 (a).

The judgment of the Circuit Court of Appeals was entered on July 28, 1939, and petition for certiorari was filed the same day. The writ of certiorari was granted on October 10, 1939.

Questions Presented.

As limited by this Court in granting the writ, the questions presented for review are:

1—Did the Trial Court correctly dispose of petitioners' claim that a portion of respondent's evidence was procured through the illegal interception of telephone and telegraph messages?

2—Was a preliminary inquiry to ascertain that fact proper?

Statute Involved.

These questions turn upon the interpretation to be given Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103, Title 47, Section 605. The statute provides that:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of competent jurisdiction, or on de-

mand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Errors To Be Argued.

The questions presented, as already stated, have been limited by this Court in granting the writ, and the argument on behalf of this petitioner will be addressed to those questions.

The errors assigned are numbers 3, (R. p. 349) 19, 20, 21, 22, 25 (p. 351), 27, 28, 29 (p. 352).

They present in substance these questions:

1—Whether on the state of facts (which petitioners at the trial offered to prove) the Government in presenting its case did not utilize and introduce

in evidence information obtained by illegal telephone and telegraph interceptions.

2—Whether the Trial Court erred in refusing to permit a preliminary inquiry into that question.

As to the second question, so as to avoid any misunderstanding of the facts, it may be noted that an inquiry was begun (p. 266), but after much argument and many limitations imposed by the Trial Court, under which the scope of the inquiry was vaguely limited, but not defined (pp. 266, 267, 270-279, 285-287), the inquiry was abruptly halted (pp. 288-289). It is contended that the Trial Court's action in effect denied petitioners any inquiry whatever into the admissibility of the testimony.

Statement.

This is the second time this Court has been asked to review substantially the same case. A judgment of conviction obtained on a similar indictment was reversed by this Court for errors in the admission of unlawfully intercepted telephone communications. (*Nardone* v. *United States*, 302 U. S. 379.) The judgment now under review was based on a superseding indictment alleging in somewhat fuller form the same transactions as those alleged in the first indictment and other related transactions and some new defendants were included. The accusations were that defendants smuggled alcohol, and concealed it after the smuggling in violation of the Tariff Act of 1930 (Title 19 U. S. C., Sec. 1593), and conspired to smuggle and conceal alcohol in violation of a familiar statute, Section 37 of the Criminal Code. Title 18 U. S. C., Sec. 88.

Upon conviction the petitioners were sentenced as follows:

Nardone to terms of two years on every count, the sentence to run concurrently, and a fine of $3,000.

Hoffman, to the same prison sentence, but a fine of $2,500.

Gottfried, to a prison sentence of one year and one day, and no fine.

Applications for bail to the District Court and the Circuit Court of Appeals pending appeal were denied, but in its opinion affirming the judgment the Circuit Court of Appeals stated that if it had an opportunity to read the record at the time of the application it would have granted bail.

> "When we denied bail originally, we had not had the chance to examine the record or to appreciate the doubts which have now appeared.
>
> Judgment affirmed; appellants admitted to bail in case they apply for certiorari within ten days after this opinion is filed."

United States v. *Nardone,* 106 Fed. (2nd) 41, 44; page 358 of this Record.

Petitioners accordingly have been enlarged on bail.

The Government's theory of the case rested almost wholly upon the charge of conspiracy, and the case was tried in the usual mode employed by prosecutors in this type of case. The broad sweep of the evidence makes a succinct statement difficult, if not practically impossible.

The two substantive offenses, the smuggling of alcohol into the port of New York in a particular instance and the concealment of that alcohol after the smuggling, were mere incidents of the trial.

The conspiracy is alleged to have begun on January 2, 1935, and continued to May 14, 1936. The proof both as to dates and events, in so far as petitioners are concerned, lacks definiteness, precision and substance, but in view of the limitations imposed by this Court on the questions for review, this subject will be dismissed with a passing glance.

It may and should be said that, while allegations and evidence related to widespread operations in various districts of the United States and beyond our boundaries, there was no proof that Nardone, or the other petitioners, were present or directly participating in these operations. The theory of their connection with the smuggling scheme was that they were participating from New York and aiding in the consummation of the scheme in varying degrees, while absent from the scene of operations. The interpretations placed upon their telephonic and other communications and the leads furnished by the tapping of wires undoubtedly played a large part in building up the case against them.

It was contended that a large vessel brought alcohol from abroad to various points off our shores, where it was transshipped to smaller boats, which brought it ashore. That was the plan at any rate and in a few instances it is said to have been successful. The movements of the vessels were said to have been directed to some extent by a radio operator employed by the conspirators.

At the first trial the Government introduced direct proof of the intercepted telephone and telegraph communications by testimony of the Government agents, who made the interceptions. The reversal by this Court was based on error in the admission of this evidence.

At the second trial now under review a different technique was employed. The wire-tapping agents were not called as witnesses.

The Government had retained records of the messages previously intercepted and introduced at the prior trial (R. p. 299).

Besides the three men, who made the interceptions, four or five others also of the Alcohol Tax Unit referred to them in the course of their investigation (p. 299) and apparently members of other government agencies, as members of a committee working on the case, had access to them (pp. 299-300).

With this background, not disclosed, of course, to the defendants, the second trial began. The first witness was Geiger, a radio operator, who had not testified at the first trial. He was identified as having been mentioned and having participated in the messages intercepted by Government agents (p. 270). Prior to these interceptions, the agents, who made them, knew nothing of any relation between Nardone and Geiger. As will be stated more fully later, the first motion based on the unlawful interception of evidence was made during the testimony of this witness (p. 41). The Court had been informally advised of the ground for the motion prior to the first statement in the record. A formal objection was made at the close of the witness' testimony and this motion stated fully the ground on which petitioners based their claim that Section 605 of the Federal Communications Act had been violated in obtaining and introducing evidence. There were numerous other objections based on the same ground, which will be specifically stated in the argument. It will suffice to say that in addition to Geiger, the evidence of numerous other witnesses was alleged by petitioners to have been obtained by unlawful interception of telephone messages (p. 279 *et seq*). The Court after hearing what was virtually a mere introduction to the evidence on this subject, declined to hear further testimony or to permit further examination of the one witness who testified as to the source of evidence (p. 286). When the Court insisted that petitioners should specify the portions of evidence, which might be inadmissible, counsel for petitioners attempted the practically impossible task. The Court finally stopped the inquiry (pp. 286-289). Nevertheless, the Government was permitted to call a witness to testify as to information, which he obtained from informers independently of the intercepted messages. On cross-examination even he admitted that he did not know the things alleged against the defendants before the intercepted messages, and did not even know that the Steamship Southern Sword had come

into port, until after the telephones had been tapped (p. 295). In addition to the offers of proof and the attempts to prove that the evidence of numerous witnesses represented the fruits of illegal tapping of wires, counsel for the defense moved that the testimony of eighteen witnesses be stricken from the record on the same ground. The motion was denied and exception was duly taken. Details of the conspiracy alleged and of the proof offered would not be helpful in the consideration of the questions to which petitioners are limited. It is the contention on their behalf that the errors in connection with these questions in and of themselves are sufficient to require a reversal of the judgment.

Summary of Argument.

POINT I.

On the state of facts, which petitioners offered to prove, it must be assumed that the Government introduced evidence, derived from unlawfully intercepted communications by wire and radio and it is urged that the reception of this evidence violated both Section 605 of the Federal Communications Act and the Fourth and Fifth Amendments of the Constitution of the United States.

This point is addressed mainly to the violation of the Federal Communications Act. It is urged that not only the direct, but also the indirect use of unlawful interceptions is forbidden and that by the statute the fruits of the crime of wire-tapping are placed under the same ban as the immediate and original records of the interceptions.

With respect to the violation of the Fourth and Fifth Amendments, the point is urged, with deference and in all courtesy. It is not clear that petitioners under the circumstances of their case are foreclosed of the fundamental rights

of privacy guaranteed by those amendments. The decision in the first *Nardone* case (302 U. S. 379) may have rendered *Olmstead* v. *United States*, 277 U. S. 438, inapplicable. The Circuit Court of Appeals in this case was in doubt on this subject: "Possibly *Olmstead* v. *United States* is no longer law."

POINT II.

It was reversible error for the Trial Court to deny a full inquiry into the question, whether the evidence, to which objection was made, was derived from unlawful intercepts by wire or radio.

The Circuit Court of Appeals found that no inquiry was required, if *Olmstead* v. *United States* were still the law, but conceded that if any inquiry was required, the inquiry, which was begun and then abruptly halted by the Trial Court, would not meet the requirement.

It is the contention of petitioners that without regard to the *Olmstead* case, a full inquiry was a matter of right, without which the inadmissibility of the evidence offered could not be determined. The denial of that right so vitally affected the case as to constitute reversible error.

Argument.

POINT I.

On the state of facts, which petitioners offered to prove, it must be assumed that the Government introduced evidence, derived from unlawfully intercepted communications by wire and radio and it is urged that the reception of this evidence violated both Section 605 of the Federal Communications Act and the Fourth and Fifth Amendments of the Constitution of the United States.

The facts, which the petitioners offered to prove, must be assumed to be true for the purpose of this argument. The Trial Court gave no opportunity to test them. The question, therefore, is, are these assumed facts sufficient to prove a violation of the statute?

Counsel for petitioners raised the question by objecting to evidence, moving to strike, and making an offer to prove that the evidence came within the ban of the statute (R. pp. 41, 46, 49-55, 94, 138, 142, 152). The subject is first referred to in the record at the close of the direct examination of the Government's first witness, Geiger, but it is apparent that the matter had been called to the Court's attention earlier: "The Court: The Court has been told of the motion" (p. 41). After the cross-examination and redirect examination of the witness Geiger, counsel for defendants moved to strike his testimony from the record and stated clearly the ground, that the testimony was obtained by the unlawful interception of telephone and telegraph messages by the process commonly known as "wire-tapping" in violation of Section 605 of the Federal Communications Act, and that the very existence of the witness, his relation to the defendants, and their relations with one another and with others had been revealed by the unlawful interceptions, and finally that

the Government had used the records of the interceptions in preparing its case, and in obtaining witnesses and evidence against defendants (p. 46). An offer to prove the facts and a request for an opportunity to do so were coupled with the objection (pp. 50-55). The offer of proof and motion were repeated several times throughout the trial, as already stated, appropriate objections and motions were made and exceptions to the Court's rulings were duly taken (pp. 55, 94, 269).

Counsel for the Government objected to the motion and offer as not being timely, and argued that the motion was governed as to timeliness by the rule laid down for motions to suppress evidence obtained by unlawful search and seizure prior to a trial. The logical distinction between the two types of cases is obvious. The Trial Court properly decided that the motion could not have been made until the trial (p. 266) and the Circuit Court of Appeals took the same view.

In the brief partial examination of the one witness Kozac, a Government agent, which was permitted, it was brought out that he, acting for the Government, had listened by tapped wires to conversations of Nardone, Gottfried, Geiger "and a host of others." He listened to Nardone sending and receiving communications (p. 267). *An objection by the Government, sustained by the Court prevented counsel from showing between what points the conversations were held* (pp. 267-268). He did not know Nardone, Hoffman, Gottfried or Geiger prior to the interceptions. The records of the interceptions, now in the United States Attorney's office, were available to all of the numerous Government investigators (p. 269). He knew nothing about any relations between Nardone and Geiger until he made the interceptions. *During the first two or three weeks the witness heard "possibly several thousand messages"* (p. 284).

The question, therefore, was preserved and is available for review.

The provisions of the statute are unmistakably clear. There are conflicting authorities on the question whether intrastate interceptions are within the statutes. We are informed that question is now before this Court. In this case the question is not important. In the record of the first Nardone trial, which is before this Court now as Defendant's Exhibit B, having been submitted with the petition for certiorari, it is established that many of the interceptions were interstate. It was unnecessary, therefore, to prove this fact at the second trial, because the objection to the evidence and offer of proof were based on the alleged use of the interceptions made prior to the first trial, and introduced in evidence at that trial (p. 289, *et al*).

Clearly there were many interstate messages among the interceptions. If proof of their interstate character were essential, it could not have been adduced because the Trial Court's ruling made such proof impossible. It has been held that the burden of proof to show the messages were not interstate is on the Government. (*Bonanzi* v. *United States*, 94 Fed. [2d] 570.)

The relevant portion of the statute (Sec. 605) contains a sweeping prohibition of all such interceptions: • • • "and no person not being authorized by the sender shall intercept any communication and divulge or publish the *existence, contents, substance, purport, effect or meaning* of such intercepted communications *to any person.*"

And there is a further unqualified prohibition against use of an intercepted message by one who receives or becomes acquainted with the interception, although he himself did not participate in the crime of intercepting: "and *no person having received* such intercepted communication *or having become acquainted* with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, *shall divulge or publish* the existence, contents, substance, purport, effect

or meaning of the same or any part thereof, *or use the same or any information contained therein for his own benefit or the benefit of another not entitled thereto.*"

It is significant that Congress expressly forbade the divulging or publication even of the very existence of the intercepted message, and the use of any information contained therein. The contention that the Government might intercept through its agents and was not within the prohibition, was disposed of finally in the decision of this Court in the first *Nardone* case (302 U. S. 379).

It is urged that this provision of the statute disposes of the argument that although interception is forbidden the information thus unlawfully obtained is available at a trial. Petitioners offered to prove that the evidence represented information obtained by the interception. In view of the clarity of the language used, it is beyond dispute that Congress intended to prohibit (a) the publication or divulging of the existence, contents, substance, purport, effect or meaning of any intercepted message by any person to any other; and (b) the use of the information derived from an intercepted message for the benefit of any one.

The statute is far more comprehensive in terms than the Fourth Amendment, which guarantees security in broad language, requiring interpretation. Although logic forced the conclusion that evidence, procured by an unlawful search could not be used by the Government at all either directly or indirectly, it was not generally accepted until this Court spoke unmistakably on the subject.

Silverthorne v. United States, 251 U. S. 385.

The rule there laid down (p. 391) can not be avoided here:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

The statute now in question is specific almost beyond the need of interpretation.

The case of *Olmstead* v. *United States*, 277 U. S. 438 has been cited in support of respondent's contention that the evidence here was admissible. The decision in that case was simply that wire tapping is not an unlawful search under the Fourth Amendment. It could not decide the applicability of Section 605, which was not then in existence. The question whether the admission of the objectionable evidence in the case at bar violated the Constitutional inhibition is a distinct question, which will be separately discussed. It is not necessary to be considered in determining the primary question now presented, that is, whether Section 605 was violated.

It has been urged that as a common law rule a Federal Trial Court in a criminal case will not take notice of the manner in which evidence has been obtained. In his dissent in the *Olmstead* case (p. 471) Mr. Justice HOLMES, one of the four dissenting judges, describes this as a "somewhat rudimentary mode of disposing of the question" and points out that the rule was overthrown by *Weeks* v. *United States*, 232 U. S. 383 and subsequent cases. He answered forcefully the argument that evidence is proper evidence, no matter how it may have been obtained (p. 470): "If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

Mr. Justice BRANDEIS, also dissenting in the *Olmstead* case stated expressly that independently of the constitutional question he was of the opinion that the judgment should be reversed. He called attention to the fact that by

the law of the State of Washington wire-tapping is a crime (p. 479). That case had been tried in the District Court for the District of Washington.

> "To prove its case the Government was obliged to lay bare the crimes committed by its officers on its behalf. A Federal Court should not permit such a prosecution to continue. Compare *Harkin* v. *Brudage*, 276 U. S. 36 id. 604" (p. 480).

Wire tapping is a crime in the State of New York, in which this case originated. (Sec. 1426 Penal Law; c. 40 Consolidated Laws, Secs. 552-553.)

Prohibited wire-tapping is also a crime under Section 501 (Title 47 U. S. C.) of the Federal Communications Act.

In passing it may be noted that unlawful interceptions of messages are deemed prejudicial not only to the defendant who made the communications but to all defendants involved in the transaction.

U. S. v. *Bernava*, 95 Fed. (2nd) 310.

This Court in the first *Nardone* case (p. 384) called attention to the serious controversy raging for years with respect to the morality of wire-tapping by officers to obtain evidence. "It has been the view of many that the practice involves a great wrong." Congress legislated to meet this situation, and to avert the invasion of home as well as office by modern devices, and the destruction of the right of personal security and privacy, which the Constitution was intended to guarantee. It considered the fundamental rights involved of more importance than the mere convenience of law enforcement officers. Its language was unequivocal. The legislation becomes futile and the purpose of it is frustrated, if any one of thousands of Government agents may intercept communications, and circumvent the law against such interceptions by using the fruits of the crime in Court

and elsewhere in every way except by the direct introduction of the messages themselves in evidence. It can not be assumed that Congress intended to express a pious abhorrence and condemnation of the practice, but to wink at its continuance.

With respect to the violation of the Fourth Amendment, it will be noted that although the decision in the *Olmstead* case seemed at the time to dispose of the matter, the subsequent decision in the first *Nardone* case was considered by two Appellate Courts as having possibly re-opened it for further consideration.

> *United States* v. *Nardone*, 106 Fed. (2nd) 41;
> *Valli* v. *United States*, 94 Fed. (2nd) 687.

It is respectfully urged that the potential dangers to fundamental rights, already amply illustrated by concrete cases, would justify and may require further interpretation of the safeguards, established by the Bill of Rights, and a broader statement of their application than was made in the *Olmstead* decision.

POINT II.

It was reversible error for the Trial Court to deny a full inquiry into the question, whether the evidence, to which objection was made, was derived from unlawful interceptions by wire or radio.

This proposition follows as a corollary from the one above argued.

If the fact of unlawful interception is pertinent and proper as a ground for objection to the evidence, the inquiry asked of necessity must be proper and essential. The sole ground for objection to the inquiry was that it was not timely. As already pointed out, this objection was elim-

inated by the decision in *Weeks* v. *United States*, 232 U. S. 383 and decisions which followed it. The Circuit Court of Appeals in this case, while doubtful of the extent to which the legislative prohibition might be carried, suggested that if there were to be a discovery, it must be complete, 106 Fed. (2nd) 41, 44:

> "In substance the judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine, as to any specific evidence they could point out. Evidence does not bear the earmarks of its acquisition. One thing leads to another, and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure."

A substantial reason for a complete disclosure was demonstrated when the request for an inquiry was made.

Defendant's Exhibits A and B (for identification) the records of the previous trial and of a removal hearing, contained evidence, not disputed, that the Government had unlawfully intercepted messages, and there was a reasonable inference that it had obtained by that means, witnesses and evidence used at the second trial. The offer of proof went beyond these exhibits, but in themselves they afforded definite evidence that the proposed inquiry was not sought as a fishing inquiry, born of curiosity and optimism. It was clear error for the Court under such circumstances to insist upon specifications of evidence unlawfully obtained and used, as a condition precedent to an inquiry. Since neither the identity of the witnesses, nor their testimony, nor for that matter any of the Government's evidence was disclosed to petitioners in advance, and the use made of the "tapped" messages was likewise shrouded in secrecy, a full and complete inquiry was essential to determine whether and how far the agents of the Government had violated the law and

circumvented the rule laid down by this Court. The circumstances pointed to the conclusion, but it could be established only by questioning those, who had obtained and used the information.

CONCLUSION.

The judgment of the Court below should be reversed for error in denying an inquiry into the alleged violation of Section 605 of the Federal Communications Act in obtaining evidence and in receiving evidence demonstrably violative of that statute.

Dated, New York, N. Y., November 1, 1939.

Respectfully submitted,

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